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NO. 58087-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of:

PAUL MOORE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

SARAH B. SAPPINGTON
Senior Counsel
WSBA #14514
Criminal Justice Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 389-2019

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B. **Where there was no evidence that Mr. Moore was unable to understand the proceedings or assist counsel, did trial counsel's stipulation to certain exhibits constitute ineffective assistance of counsel?**

C. **Where the SVP statute imposes no requirement that future dangerousness occur within a specific time period, was the State required to limit the assessment of future dangerousness to the foreseeable future?**

II. STATEMENT OF THE CASE

Paul Moore was born on July 25, 1967. Finding of Fact No. 1, CP at 25; CP at 263. He has been convicted of two sexually violent offenses, as that term is defined in RCW 71.09.020(15): Rape in the First Degree, with a Deadly Weapon (1985) and Attempted Rape in the Second Degree, by Forcible Compulsion (1990). Finding of Fact No. 3, CP at 26; CP at 263, 265. In addition to these sexually violent offenses, Moore has committed several other offenses which were sexually motivated. Findings of Fact No. 5-9, CP at 28-29; CP at 263-270.

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A. Sexually Violent Offenses

1. Rape in the First Degree, with a Deadly Weapon (Sept. 14, 1985)

The first sexually violent offense for which Mr. Moore was convicted occurred in Seattle, Washington. Finding of Fact No. 3(a), CP at 26; CP at 35. On September 14, 1985, Mr. Moore entered a beauty salon, brandishing an 8-inch steak knife and carrying a brown paper bag. *Id.* He told Petra S., who was working in the salon, and her customer to "[s]hut up and do what I say." *Id.* After locking the door to the salon, Mr. Moore ordered the two women into a back room and instructed the customer to "[s]it down and shut up," or words to that effect. Finding of Fact No. 3(a), CP at 26; CP 35-36. He ordered Petra to take off her pants and her shirt and to perform oral sex on him. Finding of Fact No. 3(a), CP at 26; CP at 36. Petra began choking and gagging. *Id.* Mr. Moore again told Petra to take off her pants and he attempted to anally rape her. *Id.* When he was unable to anally penetrate Petra, he vaginally raped her. *Id.* After assaulting Petra, he told the two women not to come out of the room or he would "burn the place down." *Id.* After he left, Petra immediately tried to call the police, but discovered that the phone cord had been cut. *Id.* She ran out of the salon, screaming that she had been raped. *Id.*

When Mr. Moore was later arrested for this offense, he was carrying a green 7-Up bottle, filled with gasoline, inside a paper bag. *Id.* When he committed this offense, he was on parole pertaining to a juvenile adjudication for Intimidation with a Weapon. CP at 36.

Mr. Moore was initially charged with Rape in the First Degree with a Deadly Weapon and Robbery in the First Degree. *Id.* When issues concerning his competency to stand trial arose, he was sent to Western State Hospital (WSH) for evaluation. *Id.* After approximately 13 months of extended observation, Mr. Moore was determined to be competent to stand trial. He subsequently pled guilty to Rape in the First Degree with a Deadly Weapon in King County Superior Court on October 13, 1987. Finding of Fact No. 3(a), CP at 26; CP at 36. He was sentenced to 75 months confinement. *Id.*

2. Attempted Rape in the Second Degree by Forcible Compulsion (Feb. 23, 1990)

Mr. Moore committed his second sexually violent offense while he was incarcerated at the Special Offender Center in Monroe, Washington, serving his sentence for the 1985 rape of Petra S. Finding of Fact No. 3(b), CP at 27; CP at 37. At that time, Linda P. was Mr. Moore's counselor. *Id.* On the morning of February 23, 1990, Mr. Moore rushed into Linda's office without her permission. *Id.* As he approached her, Linda started to scream.

Id. He told her to stop screaming and pushed her into the wall. *Id.* While holding a weapon (made of two pencils that he had taped together) to her ribcage, Mr. Moore grabbed Linda and forced her into the corner of her office that was the furthest from view of the outside hallway. *Id.* He then pushed Linda's head to knee level and demanded that she "bend over." *Id.* Continuing to hold the pencils to her ribcage, he pushed his crotch to her buttocks; Linda could feel that he had an erection. *Id.* Mr. Moore ordered Linda to the floor; she continued struggling against him. *Id.*

A nurse outside of Linda's office heard a muffled scream and called a "code" situation. *Id.* The first staff person to arrive was Joe G. *Id.* When Joe entered Linda's office, he saw that Mr. Moore had one arm around Linda's neck and the other was holding the pencils against her as a weapon. *Id.* Joe heard Mr. Moore say something that sounded like "shut up." *Id.* Joe pulled him away from Linda and restrained him. *Id.* The previous day, Joe had overheard Mr. Moore talking to another inmate about having sex with Linda. *Id.* At an infraction hearing held on March 12, 1990, Mr. Moore acknowledged that he intended to have sex with Linda P. when he assaulted her. *Id.*.

In June 1990, Mr. Moore was charged with Attempted Rape in the Second Degree by Forcible Compulsion. CP at 37. His competency was again questioned, and he was returned to Western State Hospital for

evaluation. *Id.* After evaluation, Dr. Greg Gagliardi opined that Mr. Moore had the capacity to fake symptoms of mental illness, and was extremely dangerous and violent. CP at 239. Mr. Moore was found competent to stand trial and pled guilty to Attempted Rape in the Second Degree by Forcible Compulsion in the Snohomish County Superior Court. Finding of Fact No. 3(b), CP at 27; CP at 37. He was sentenced to 50 ½ months confinement. *Id.*

B. Other Offenses

1. Custodial Assault in the First Degree (Jun. 4, 1991)

On June 4, 1991, while still incarcerated for the 1990 attempted rape of Linda P., Mr. Moore assaulted Elaine L., a corrections officer at the Special Offender Center in Monroe, Washington. Finding of Fact No. 5(a), CP at 28; CP at 38. While Elaine was assisting Mr. Moore with cleaning his cell, he struck her on the head with a broom handle, lunged at her, and shoved her into his cell. *Id.* The victim sprayed Mr. Moore with the disinfectant she was carrying and ran out of the cell. *Id.* When questioned about this offense by Dr. Richard Packard on March 19, 2003, Mr. Moore admitted that he lunged toward Elaine Ann L. to "try to do something sexual to her." Finding of Fact No. 5(c), CP at 28; CP at 38.

Mr. Moore was charged with Custodial Assault in the First Degree in Snohomish County Superior Court. Finding of Fact No. 5(b), CP at 28; CP at 38. He was again committed to Western State Hospital for

observation, who again determined that Moore was competent to stand trial. CP at 230. Though Western State personnel determined that Moore was competent, the trial court did not believe him to be competent, and the charges were dismissed. *Id.*

2. Custodial Assault with Sexual Motivation (Feb. 19, 1995)

On February 19, 1995, while still incarcerated for the 1990 attempted rape of Linda P., Mr. Moore assaulted Cheryl S., a corrections officer at the Washington Corrections Center in Shelton, Washington. Finding of Fact No. 6(a), CP at 28; CP at 38. As the inmates were returning to their cells after breakfast, he ran up to Cheryl, grabbed her from behind, held her around the chest, and pinned her arms in front of her. *Id.* Mr. Moore then twisted Cheryl and thrust his pelvis into her buttocks. *Id.* Another officer witnessed the assault and assisted Cheryl in gaining control of Mr. Moore. *Id.* Cheryl suffered physical injury as a result of this assault and could not work for approximately eight months. *Id.*

Mr. Moore was charged with Indecent Liberties by Forcible Compulsion for his offenses against Cheryl S. Finding of Fact No. 6(c), CP at 29; CP at 39. On February 3, 1997, after another evaluation at Western State Hospital, he pled guilty to Custodial Assault with Sexual

Motivation[1] in Mason County Superior Court, and was sentenced to 60 months confinement. *Id.*

3. Indecent Liberties by Forcible Compulsion (Apr. 22, 2003)(acquitted)

On April 22, 2003, while detained at the Special Commitment Center (SCC) pending his civil commitment trial, Mr. Moore grabbed Dr. Carole D., his forensic therapist, from behind. Finding of Fact No. 9, CP at 29. He pressed his body against hers and thrust his hips against her buttocks in a manner indicative of sexual intercourse. *Id.* Other SCC staff were present, observed this assault, and gained control of Mr. Moore. CP at 188.

Mr. Moore was charged with Indecent Liberties by Forcible Compulsion in Pierce County Superior Court. *Id.* After a bench trial, Mr. Moore was acquitted of this offense. *Id.*

4. Assault in the Fourth Degree (Oct. 22, 2003)

On October 22, 2003, while at the SCC, Mr. Moore assaulted Cynthia W., a female staff member at the Special Commitment Center. Finding of Fact No. 7(a), CP at 29; CP at 39. As he walked past the staff desk, Mr. Moore turned and charged at staff members, attempting to hit

[1] While Indecent Liberties by Forcible Compulsion is a sexually violent offense, as defined in RCW 71.09.020(15), Custodial Assault with Sexual Motivation is not. *See* RCW 71.09.020(15).

them. *Id.* When Cynthia moved under the counter to protect herself, Mr. Moore repeatedly kicked her in the leg. *Id.*

Mr. Moore was charged with Assault in the Fourth Degree for his offense against Cynthia W. in Pierce County Superior Court. Finding of Fact No. 7(b), CP at 29; CP at 39. He pled guilty to this charge on April 26, 2005. *Id.*

C. SVP Trial Procedure

The State filed a petition alleging Mr. Moore is a sexually violent predator pursuant to RCW 71.09 on May 1, 2002. CP at 35. Prior to trial, Mr. Moore's counsel moved for a hearing to determine Moore's competency and to consider whether the court should appoint a Guardian ad Litem (GAL) on his behalf. CP at 217. In her supporting declaration, counsel for Mr. Moore indicated that she and co-counsel had attempted to discuss the case with Mr. Moore on two occasions, and had witnessed his behavior on a third. On each of these occasions, Mr. Moore had been unresponsive. CP at 214-215. The court set a competency hearing. At that hearing, Dr. Lee Gustafson submitted a report to the court and testified to Mr. Moore's competency. 9/20/02 RP at 2-20. Dr. Gustafson testified that he had evaluated Mr. Moore's competency approximately four times in the course of the preceding ten years. 9/20/02 RP at 5. On "one or two" of those occasions, Dr. Gustafson had found him

incompetent to stand trial. *Id.* On those occasions, Dr. Gustafson testified, Mr. Moore had not been on anti-psychotic medication, and his self-care "had deteriorated to the point where he was not bathing. There was feces in his hair. He was, in fact, drinking out of the urinal, and his skin was literally rotting off his body. Any efforts to engage him in any kind of conversation met with silence; he refused to talk." *Id.* Dr. Gustafson had attempted to interview Mr. Moore at the SCC, but he had refused to speak to him. *Id.* He had, however, reviewed a report from Mr. Moore's therapist at the SCC, who indicated that, although there were times that Mr. Moore had refused to talk, at other times he "communicated clearly what he wanted and seemed to clearly understand what was said to him." *Id.* at 6. Dr. Gustafson testified that when he had observed Mr. Moore immediately before the hearing, he appeared cooperative and was talking to his attorney. 9/20/02 RP at 6. He stated that Mr. Moore "clearly understood what his attorney was saying, and he responded appropriately and cooperatively in his conversations with her." *Id.* Asked whether a GAL would be in Mr. Moore's best interests, Dr. Gustafson stated that, when Mr. Moore was cooperating and talking with his attorney, a GAL would not be necessary. 9/20/02 RP at 8. He went on to say that, if Mr. Moore was not cooperating with his attorney and a

decision needed to be made on a timely basis, a GAL would be useful. 9/20/02 RP at 8-9.

The trial court, having heard this testimony, revealed its reluctance to appoint a guardian if in fact one was not necessary. The court stated that it "would rather not have someone else in a position making important decisions" for Mr. Moore to the extent he was "cooperative and lucid and medication is helpful to him." *Id.* at 10. The court made a finding that Mr. Moore was competent to stand trial and had "the requisite barebones knowledge of the proceedings to act on his own with [counsel's] advice." *Id.* at 15. He did, however, appoint a "standby" GAL, ruling that, if a situation arose where defense counsel or the GAL felt that Mr. Moore was not able to make his own decision, there would be another hearing to reevaluate Mr. Moore's status. 9/20/02 RP at 14-15[2].

A bench trial began on March 7, 2006. Prior to the trial, Mr. Moore's trial counsel filed motions in limine regarding fifteen evidentiary issues. CP at 165-183. Counsel for the State and Mr. Moore reached agreement on several issues and the trial court ruled on the remainder. 3/7/06 RP at 2-51. At the request of the State, Mr. Moore was placed in the jury box in restraints during trial because of his history of

[2] Beyond the initial (oral) appointment, there is no further mention of the Standby GAL, and he does not appear to have ever been asked to participate or intervene.

both nonsexual and sexually assaultive behavior, particularly against "females that he likes." 3/7/06 RP at 2-3.

Following the first portion of direct examination of the State's expert, Dr. Richard Packard, and a brief pause during which Mr. Moore conferred with counsel, the parties entered a document entitled "Stipulated Facts and Exhibits" (hereinafter "Stipulation") into evidence. 3/7/06 RP at 72. Defense counsel stated that Mr. Moore stipulated to the document but wanted the record to reflect his continuing objections to certain portions of the evidence identified in his motions in limine. 3/7/06 RP at 72-73. The court acknowledged the continuing objection. 3/7/06 RP at 73. She also stated that because Mr. Moore's expert, Dr. Donaldson, was unavailable, his testimony would be presented through his report. *Id.* Following the first day of trial, Mr. Moore, at his own insistence, did not return for the remainder of the trial. 3/7/06 RP at 143-144. Trial counsel stated that "I have spoken with Mr. Moore. He is requesting that he not be present for the rest of the trial. He—I've asked him this several times. I've given him my advice, and he feels strongly about this. He would like to waive his presence" for the rest of the trial. *Id.* On March 9, 2006, the trial court committed Mr. Moore as a Sexually Violent Predator. 3/9/06 RP at 51-51; CP at 5-14.

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III. ARGUMENT

A. The Trial Court did not Violate Mr. Moore's Right to Due Process by Accepting the Stipulated Evidence.

Mr. Moore argues that his rights to due process were violated when the trial court accepted the Stipulation without conducting an inquiry into his competence. This argument is predicated on the assumption that Mr. Moore, notwithstanding the court's September 20, 2002 determination of competence, was in fact not competent, and was incapable of assisting counsel. There is, however, a strong presumption in favor of competence, and in favor of trial counsel's ability to determine whether his or her client is in fact competent. Nor do the facts of this case support the conclusion that Mr. Moore was unable to assist counsel. The record is clear that, despite past bouts of psychosis, Mr. Moore was in fact competent throughout these proceedings, and no additional safeguards beyond those employed by the trial court were necessary.

Mr. Moore argues that the trial court should not have accepted the parties' Stipulation without first conducting a broad-ranging inquiry into whether his resultant waiver of the right to cross examine various witnesses was in fact knowing, intelligent and voluntary. App. Br. at 11. While acknowledging that "a trial predicated upon stipulated facts is a perfectly permissible procedure," and that "there is no strict rule

mandating such formal permission," he urges that the court "must insure an SVP detainee receives due process of law" based on the particular facts of the case. *Id.*

There is no evidence in this case that anyone – Mr. Moore's attorney, the court, or the State's attorney – believed that Mr. Moore was incompetent. While the opinion of counsel is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings.[3] *Hernandez v. Ylst,* 930 F.2d 714 (C.A.9 (Cal.) 1991, citing *United States v. Clark,* 617 F.2d 180, 186 (9th Cir.1980) (fact that defendant's attorney considered defendant competent to stand trial was significant evidence that defendant was competent). In *Hernandez*, the Ninth Circuit deemed significant the fact that "neither the trial judge, government counsel, nor Hernandez's own attorney perceived a reasonable cause to believe Hernandez was incompetent" citing *United States v. Richardson,* 586 F.2d 661, 667 (9th Cir.1978).

Nor do the particular facts of this case suggest that any additional safeguards were required. For each of Mr. Moore's six previously-charged crimes, he was assessed for competence and psychiatric staff found him competent in each instance. CP at 36-42. In only one

[3] Although not dispositive of the issues before this court, it should be noted that Division II of this court has rejected the argument that a right to competency inheres in the right to effective assistance of counsel in a SVP proceeding. *State v. Ransleben*, 135 Wn. App. 535, 540, 144 P.3d 397 (2006)

instance, the Custodial Assault against Elaine L. in 1991, did a trial court deem Mr. Moore not competent to stand trial, notwithstanding WSH staff's determination to the contrary. Finding of Fact No. 5(b), CP at 28 CP at 38. Mr. Moore cites Dr. Gustafson's 2002 evaluation, written four years before trial, in support of his contention that he was only "marginally competent." CP at 293. In that same report, however, Dr. Gustafson writes that, "[o]n a more likely than not basis, I believe Mr. Moore is capable of understanding the basic issues in a civil commitment proceeding. Currently, to the best of my knowledge, his reality testing regarding his legal status is not impaired by his mental illness. He is capable of communicating his decision." *Id.* At trial, Dr. Gustafson testified that he had evaluated Mr. Moore for competency on several occasions, and that on "one or two of those occasions," he had found him incompetent to stand trial. 9/20/02 RP at 5. On those occasions, he explained, Mr. Moore had not been on anti-psychotic medication, and his self-care "had deteriorated to the point where he was not bathing. There was feces in his hair. He was, in fact, drinking out of the urinal, and his skin was literally rotting off his body. Any efforts to engage him in any kind of conversation met with silence; he refused to talk." *Id.* This was, however, not currently the case. Dr. Gustafson referred to a report from Mr. Moore's therapist at the SCC that indicated

that, although there were times that Mr. Moore had refused to talk, at other times he "communicated clearly what he wanted and seemed to clearly understand what was said to him." *Id.* at 6. He went on to testify that, when he had observed Mr. Moore immediately before the competency hearing that day, he appeared cooperative and was talking to his attorney. *Id.* He stated that Mr. Moore "clearly understood what his attorney was saying, and he responded appropriately and cooperatively in his conversations with her." *Id.* Asked whether a guardian would be Mr. Moore's best interests, Dr. Gustafson stated that, when Mr. Moore was cooperating and talking with his attorney, a guardian would not be necessary. *Id.* at 8. However, if Mr. Moore was not cooperating with his attorney and a decision needed to be made on a timely basis, a guardian would be useful. *Id.* at 8-9.

Mr. Moore also cites Dr. Packard's trial testimony and interview of him in support of the proposition that additional procedures were required to protect his rights to due process. He argues that that his interview with Dr. Packard offers "examples of his inability to understand basic concepts," and cites Mr. Moore's odd explanation of the phrase "all that glitters is not gold" to illustrate this deficiency. App. Br. at 13-14.

While it appears clear that Mr. Moore was unfamiliar with various proverbs and struggled with metaphors, such difficulties should not be

confused with the skills necessary to assist counsel at trial or to enter into agreements in the course of trial. Moreover, the interview with Dr. Packard, considered again in its entirety, supports the conclusion that Mr. Moore was able to understand questions, understood the nature of the proceedings against him, and could discuss the case and his past offending cogently.

Although Mr. Moore did not understand the metaphorical meaning of such phrases as "all that glitters is not gold" or "rolling stones gather no moss," he understood the components of the phrases and the general information contained within. For example, although Mr. Moore was not familiar with the expression "rolling stones gather no moss," he indicated that he knew that moss only grows on the north side of trees and attempted to discern the meaning of the metaphor based on his understanding of the words it contained. Ex. 6 at 52. Mr. Moore was also able to complete all the memory and numerical understanding questions that Dr. Packard asked, give the current date, name current and prior presidents, and recall series of words and numbers. *Id.* at 47-51. He was able to identify the medications he was currently taking (*Id.* at 52) and, when asked whether he was mentally ill, replied that he did not think that he was. *Id.* at 55. When asked whether he believed he had ever been mentally ill, he responded, with surprising insight, "[w]ell, that's a complicated question..." *Id.* This fundamentally cogent

mental state was reflected in Dr. Packard's May 19, 2003 report submitted following his interview with Mr. Moore. There, Dr. Packard noted that "[c]urrently, Mr. Moore appears to be better compensated in his mental health than he has [been] for a number of years. Upon initially meeting him, I was impressed with the progress from when I first saw him in February 2002. He related much better, had much improved hygiene, was much more cooperative, and was cognitively more focused and capable." Ex. 12 at 11.

At the 2002 competency hearing, Mr. Moore addressed the trial court with what appeared to be full understanding of the proceedings. Not only did he cooperate with the proceedings, he engaged the court, asked questions, and, upon obtaining more information, altered his decision accordingly: Initially, Mr. Moore stated that he was competent to stand trial did not want a GAL. 9/20/02 RP at 12. After asking some questions of the court about the role of the GAL, the process for obtaining a guardian, and whether having a GAL would interfere with his ability to talk to Dr. Gustafson, he determined that he would in fact like one. *Id.* at 12-14. At a later hearing, Mr. Moore inquired into the purpose of an upcoming hearing and, upon learning that it would only be a status conference and not his trial, he waived his presence. *Id.* at 5. Elsewhere in the record, Mr. Moore's comments to the court revealed that he

understood the nature and implications of the proceedings and of any stipulation he might enter into. At a pre-trial status conference, for example, he indicated to the court that he wanted to stipulate to commitment as an SVP, saying, "I just want to say that if I get released, I would do another sexual offense," and that he wanted to go back to the SCC. *Id.* at 3.

Mr. Moore cites *In re Stout*, 159 Wn.2d 357, 150 P.3d 86 (2007) in support of his argument that Mr. Moore was not afforded due process when the trial court accepted his Stipulation to the admissibility of certain evidence. App. Br. at 10. *Stout*, however, is inapposite, and stands merely stands for the proposition that due process is not violated if a video deposition is used over a respondent's objection, where that respondent had a previous opportunity to cross-examine the witness. 159 Wn.2d at 371. *Stout* does not, as Mr. Moore suggests, create an inverse rule that tactical decision by an SVP respondent and counsel **not** to cross-examine automatically violates due process. Nor is there any support for Mr. Moore's suggestion, based on a variety of cases from the criminal context, that the constitution not only guarantees but mandates cross examination in all cases.

Mr. Moore appears to argue that, because Dr. Gustafson stated that his mental condition could vary from week to week, the court was

required to reevaluate his competence whenever Mr. Moore made a decision. Mr. Moore fails to cite to any authority to support this contention, nor do the facts support such a requirement. All parties were well aware of issues related to Mr. Moore's mental health. At the September 20, 2002 competency hearing, the trial court addressed the risk of Mr. Moore's condition changing and rendering him incompetent. 9/20/02 RP at 13-18. The court stated that, although Mr. Moore appeared competent at this time, a "stand-by" GAL would be appointed in case, at some point in the future, he was no longer competent. *Id.* at 17. The various behaviors that indicated Mr. Moore was losing contact with reality (gross deficiencies in self care and a refusal to talk to or cooperate with counsel) were discussed extensively. *Id.* at 4-12. Trial counsel was familiar with this conduct and had, indeed, originally filed the motion for a competency hearing based on such behaviors. CP at 214-216. Trial counsel, who knew that a guardian was available if needed, was in the best position to determine if Mr. Moore was in fact incapable of assisting her. There is nothing in the record to suggest that trial counsel ever had reason—or should have had reason--to believe a GAL was in fact necessary. Mr. Moore's contention that his rights to due process were not protected is without authority in the facts or in the law, and should be rejected.

Mr. Moore also asserts that he was deprived of his rights to due process because the court accepted his stipulation to the admissibility of allegations against him in the 2003 charge of Custodial Assault "without any additional inquiries by the court as would be required under RCW 71.09.060(2) if those criminal charges were the source of the SVP petition." App. Br. at 16. This argument is without merit.

The State's petition relied upon two sexually violent offenses, Rape in the First Degree and Attempted Rape in the Second Degree. CP at 32. Mr. Moore was found competent to stand trial for each offense and was subsequently convicted. *Id.* Because the State relied on convictions for two sexually violent offense convictions as the basis for the petition, RCW 71.09.060(2), which pertains to cases in which the State is proceeding in the absence of a criminal conviction, does not apply.[4] While appearing to concede that, by its plain language, RCW 71.09.060(2) does not apply ("additional inquiries....would be required.... **if those criminal charges were the source of the SVP petition,**"), Mr. Moore nonetheless seems to suggest that such an inquiry is required by due process. As previously discussed, however, there is nothing about the

[4] RCW 71.09.060(2), provides for a preliminary hearing to be held in cases where the offender "has been found incompetent to stand trial, or is about to...be released pursuant to RCW 10.77.90(4)" and has never been actually convicted of a sexually violent offense as required by RCW 71.09.20(16). For an example of the application of this section, *see In re Greenwood*, 130 Wn. App 277, 122 P.3d 747(2005).

facts of this case that suggests that Mr. Moore did not in fact understand the proceedings against him, or that any additional safeguards were required.

Mr. Moore further argues that "[b]ecause Mr. Moore contested the validity of his prior convictions and the underlying accusations and since he had limited ability to understand the proceedings, the court should not have merely stood by while counsel stipulated to the case." App. Br. at 18. Mr. Moore also claims that, because he had other, non-sexual, motives when he committed the crimes or alternatively because his perceptions of "sexual activity are of dubious value," he should not have been allowed to stipulate to the admission of the exhibits. *Id.* at 17.

To characterize Mr. Moore as having "contested the validity of his prior convictions" or having contested the sexual motivation of those crimes is, however, inaccurate. First, he does not actually appear, in his brief, to be contesting the validity of his prior proceedings, nor does he provide any authority for his ability to make such a collateral attack in this context. In an SVP proceeding, an individual cannot attack the validity of a conviction that is constitutionally valid on its face. *In re Young*, 122 Wn.2d 1, 54-55, 857 P.2d 989(1993). Not did Mr. Moore ever appear to genuinely dispute the sexual motivation of his various assaults. In discussing his assault against Linda P., for example, he stated, in his guilty

plea, that he "attempted to have sexual intercourse by forcible compulsion with Linda (P.) and took a substantial step towards committing the crime of rape." Ex. 2 at 3-4. At an infraction hearing held on March 12, 1990, Mr. Moore acknowledged that he intended to have sex with Linda P. when he assaulted her. CP at 37. Discussing the incident with Dr. Packard many years later, he said that he "tried to force her to have sex with me...I felt she owed me some sex." Ex. 6 at 7. Although he mentioned during the course of this conversation that he wanted to go back to Shelton, when asked, "[w]ere you trying to have sex with [Linda P.]?" he replied, "[y]eah." Ex. 6 at 60. When discussing his assault against Cheryl S., Mr. Moore stated, as part of his guilty plea, that he had "acted with sexual motivation." Ex. 4 at 9. When Dr. Packard asked, "[d]id you want to have sex with [Cheryl]?" Mr. Moore responded, "[w]ell, yeah, I wanted to." *Id.* at 6. When discussing his assault against Elaine L., Mr. Moore told Dr. Packard that he "lunged towards her to try to do something sexual to her." Ex. 6 at 43. It is clear that Mr. Moore understood and agreed that his various assaults were sexually motivated. Mr. Moore's rights to due process were not violated, and his argument should be rejected.

B. Mr. Moore Received Effective Assistance of Counsel.

Mr. Moore argues that his counsel was ineffective because she did "not act as an advocate" and failed to object to several exhibits or insure

that he understood the Stipulation. This argument is meritless. First, as discussed at length above, there is simply no evidence that Mr. Moore's counsel failed to communicate with him, or that Mr. Moore did not understand that significance of stipulating to the admissibility of certain exhibits. Second, there is no evidence of prejudice. As such, this argument should be rejected.

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Stout*, 159 Wn.2d at 377. The proper measure of attorney performance is whether the actions by counsel were reasonable under prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The court will "strongly presume effective representation" and will not consider strategic or tactical decisions ineffective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *In re Stout*, 128 Wn. App. at 28.

Mr. Moore argues that his right to counsel was violated because his attorney did not "act as an advocate" as required by due process and therefore prejudice need not be shown. App. Br. at 20-21. Citing a

variety of criminal cases, he argues that "[w]hen counsel does not perform his or her function, it is equivalent of the complete denial of counsel and the respondent need not show prejudice to prevail." App. Br. at 20-21. It is unclear if Appellant is arguing to ignore the second prong of *Strickland*, that is, that counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The courts of the state, however, have held that *Strickland* is the appropriate standard for analyzing ineffective assistance of counsel claims in the context of civil commitment. *In re the Detention of T.A. H-L.*, 123 Wn. App. 172, 97 P.3d 767 (2004); *In re Stout*, 159 Wn.2d at 377. As such, Mr. Moore must show that the outcome of the trial would have been different in order to prevail. *Strickland*, 466 U.S. at 688; *In re Stout*, 159 Wn.2d at 377.

Moore cites two dependency cases to support his argument that he received ineffective counsel due to counsel's failure to challenge the State's evidence: *In re the Dependency of G.A.R.*, 137 Wn. App. 1, 150 P.3d 643 (2007) and *In re the Welfare of J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005). App. Br. 21-22. Both are, however, inapposite, in that both involve conduct by counsel that was utterly unreasonable. In *G.A.R.*, for example, 65 exhibits were admitted without any objection or comment by defense counsel. *G.A.R.*, 137 Wn. App. at 4. The State's sole witness

was a social worker who testified to the mental competency of the mother based on reports from a doctor, including explaining the doctor's diagnosis of the mother's personality disorder and explaining the ways in which that condition affected the mother's ability to raise children. *Id.* at 4-6. Counsel did not object or ask any questions throughout the entire proceeding. *Id.* When the court asked if counsel had any final remarks, counsel replied "[j]ust briefly, Your Honor. I wish I had a case to present if my client were here, but other than that I do not have anything else." *Id.* at 6. On appeal, the court held that the failure by counsel to object to any evidence or attack any portion of the State's position constituted prejudicial ineffective assistance of counsel. *Id.* at 8-9.

In *J.M.*, counsel, in the absence of the client, stipulated to the facts and allowed written reports to be entered. *J.M.*, 130 Wn. App. 912. The reports were by individuals who were not experts in the respective field of the reports. *Id.* at 915. As in *G.A.R.*, there were non-expert witnesses who testified to the diagnosis of doctors and the implications of that diagnosis on the mother and her ability to raise children. *Id.* at 916-918. Throughout the hearing, there were no statements by counsel, no objections, no motions, and no cross-examination. *Id.* The defense consisted of the following statement by defense counsel:

> Thank you, your Honor, may it please the Court, I will not be calling any witnesses. I would make the following comment: I did have occasion to speak to my client, Ms. .... Her position has been consistent all the way along. She disputes -- emphatically disputes -- any and all of the allegations and contentions in this matter, does not understand why the State is desirous of taking [J.M.] away from her, and just feels this is totally wrong. Thank you, your Honor.

Id. at 918. The court held that the absence of any defense, the failure of counsel to object to the non-experts testifying extensively to the psychological findings of experts, and the failure of counsel to challenge any of the State's evidence constituted prejudicial ineffective assistance of counsel. *Id.* at 924-925.

Mr. Moore argues that the entry of the Stipulation and waiver of cross-examination of some of the witnesses was analogous to the absence of advocacy in *G.A.R.* and *J.M.* There is, however, little comparison between Mr. Moore's trial counsel and those in *G.A.R.* and *J.M.* Unlike trial counsel in *G.A.R.* and *J.M.*, Mr. Moore's trial counsel objected to portions of the evidence through a fifteen-part Motion in Limine. CP at 165-183. In those Motions, she objected on a wide range of evidentiary issues including limiting the expert testimony, excluding evidence of crimes for which Mr. Moore had not been convicted, and testimony about pending charges. CP at 165-183. Trial counsel cross-examined the State's expert witness extensively and conducted re-cross. 3/8/06 RP at

20-41; 3/8/06 RP at 52. Nor is there any evidence that Mr. Moore was not involved in the decision to stipulate to certain facts, or did not understand the implication of that Stipulation. In stark contrast to the respondent in *J.M.*, Mr. Moore was present in court when counsel indicated that he agreed to the admission of certain stipulated facts. 3/7/06 RP at 75.

Mr. Moore argues that trial counsel should have cross-examined the various witnesses who established his prior acts of sexual violence to test their veracity or challenge their version of events, and by stipulating to the testimony, he was unable to cross-examine them. App. Br. at 22. It is difficult to see how this could or would have made any difference in the outcome of the proceedings. In a Sexually Violent Predator Commitment under RCW 71.09, the State is not required to prove the facts underlying a conviction of a sexually violent offense; the State is only required to prove the fact of a conviction. *In re Stout*, 159 Wn.2d at 367; *In re Young*, 122 Wn.2d at 54-55. Thus, even if Mr. Moore had vigorously challenged the testimony of the victims of his offenses—an unlikely state of affairs in light of the fact that he essentially admitted to each assault in his interview with Dr. Packard-- it is unclear what difference this would or could have made in the final outcome of the case.

Mr. Moore also argues that, because he may have been mentally ill when the prior crimes occurred, trial counsel should have challenged the

conclusion that he "committed a sexually violent act on that prior occasion." App. Br. at 22. As previously noted, an individual cannot attack the validity of a conviction that is constitutionally valid on its face in a SVP proceeding. *See Young*, 122 Wn.2d at 54-55. Even if he had attempted to do so, Mr. Moore would not have been allowed to challenge the conclusion that he was convicted of having committed a sexually violent offense on a prior occasion. *Id.*

Mr. Moore challenges trial counsel's performance on several further grounds. He notes, for example, that trial counsel did not make an opening statement, that her closing statement was brief, that she stipulated to the admissibility of various reports that would otherwise have been inadmissible, that she submitted a report by her expert in lieu of live testimony, and that she allowed a letter by State's counsel to come in as an exhibit. App. Br. at 25-27. These arguments, however, are premised on the fundamentally groundless assertion that Mr. Moore was not competent to agree to such a procedure and that, without his consent, such actions violated professional norms. Again, however, there is simply no evidence that Mr. Moore did not understand the proceedings, or that trial counsel should have done more to ensure that he did. In light of the fact that he was not permitted to challenge the validity of the convictions within the context of the SVP proceeding, trial counsel's strategic decision to

recommend stipulation to certain testimony in order to avoid the impact of the many victims' highly emotional testimony was reasonable and in no way violated professional standards.

The evidence that Mr. Moore was a sexually violent predator was overwhelming. Indeed, his own expert, although he did not believe that Mr. Moore suffered from the requisite mental condition, believed that "Mr. Moore appears likely to commit a sex offense in the future. Given his history and his current mental status, it seems impossible to reach any other conclusion." Ex. 14 at 11. To show that agreeing to the stipulated facts procedure constituted ineffective assistance of counsel, Mr. Moore would have to show that such stipulation fell below prevailing professional standards, and that the result of the trial would have been different had such procedure not been followed. *In re Stout*, 159 Wn.2d at 377. The only alternative to the stipulated facts procedure followed here would have been to have required Mr. Moore to endure a lengthy trial during which victim after victim would have offered emotionally charged testimony regarding her assault at Mr. Moore's hands. To have avoided such a trial where the outcome was in all likelihood a foregone conclusion did not constitute ineffective assistance of counsel.

C. The State's Failure to Specify a Time Period Within the Foreseeable Further When Predicting Future Dangerousness Did Not Violate Moore's Rights to Due Process.

Mr. Moore argues that to satisfy due process when the individual is incarcerated, the State has to prove that sexual re-offense is likely within the reasonably foreseeable future. App. Br. at 37-38. This argument has been considered and rejected by both this Court and the Washington Supreme Court. *In re Sammy Wright*, __Wn. App.__, 155 P.3d 945, 946-47 (2007); *In re Young*, 122 Wn.2d at 59. As such, his argument is without merit and should be rejected.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the decision of the trial court committing Mr. Moore as a Sexually Violent Predator.

RESPECTFULLY SUBMITTED this 31st day of May, 2007.

ROBERT. M. MCKENNA
Attorney General

SARAH B. SAPPINGTON
Senior Counsel

NO. 58087-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of: PAUL MOORE, Appellant.	DECLARATION OF SERVICE

MARTHA NEUMANN declares as follows:

On May 31, 2007, I deposited in the United States mail, first-class postage affixed, addressed as follows:

Nancy P. Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

a copy of the following documents: RESPONDENT'S OPENING BRIEF; and DECLARATION OF SERVICE.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of May, 2007, at Seattle, Washington.

MARTHA NEUMANN
Legal Assistant